

**STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**



**IN THE MATTER OF THE PROPOSED REPEAL OF REGULATION,**

20.2.300 NMAC – *Reporting of Greenhouse Gas Emissions*

**No. EIB 11-17(R)**

20.2.301 NMAC – *Greenhouse Gas Reporting – Verification Requirements*

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**ORDER AND STATEMENT OF REASONS FOR REPEAL OF 20.2.300 and 20.2.301  
NMAC**

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This matter came before the New Mexico Environmental Improvement Board ("Board" or "EIB") upon a petition filed by Tri-State Generation and Transmission Association, Inc. ("Tri-State"), the New Mexico Oil and Gas Association ("NMOGA"), Public Service Company of New Mexico ("PNM"), Southwestern Public Service Company ("SPS"), the Independent Petroleum Association of New Mexico ("IPANM"), the City of Farmington and the Farmington Electric Utility System ("FEUS"), and El Paso Electric Company ("EPE") (collectively, the "Petitioners") proposing the repeal of 20.2.300 NMAC — Reporting of Greenhouse Gas Emissions ("Reporting Rule" or "Part 300") and the repeal of 20.2.301 NMAC – Greenhouse Gas Reporting – Verification Requirements ("Verification Rule" or "Part 301").

A public hearing was held in Santa Fe, New Mexico, on November 8-9, 2011, and November 15, 2011. The Board heard and received technical testimony from Petitioners and the New Mexico Environment Department ("NMED"), cross-examination from New Energy Economy, Inc. ("NEE") and Western Resource Advocates ("WRA"), and public comment from other interested persons.

On February 6, 2012, the Board, having reviewed the record and the transcript of these proceedings, including the record, transcript, findings and Statement of Reasons in EIB 10-04(R) and 10-09(R) (the 2010 proceedings that resulted in the promulgation of Parts 300, 301 and 350), deliberated and voted to repeal Parts 300 and 301, unanimously, by a vote of 5 to 0.

## **PROCEDURAL HISTORY**

### **A. Adoption of Part 300 (Reporting Rule)**

1. NMAC, Title 20, Chapter 2, Part 300, was proposed by NMED in a Petition that it filed on July 30, 2010.
2. Part 300 was adopted by the Board (by a vote of 5 to 1) on November 10, 2010.
3. The stated objective of Part 300 "is to establish requirements for the annual reporting of greenhouse gas emissions to the department." 20.2.300.6 NMAC.
4. 20.2.300.100 NMAC establishes greenhouse gas emission reporting requirements for general stationary fuel combustion sources, electricity generation, cement production, hydrogen production, lead production, lime manufacturing, nitric acid production, petrochemical production, petroleum refineries, and zinc production.
5. 20.2.300.100 NMAC also incorporates by reference EPA's 40 C.F.R. Part 98, into the regulations, but only through October 28, 2010. These are the EPA's emissions reporting requirements. However, Part 300 provides specified modifications, exceptions and omissions to 40 C.F.R. Part 98. See 20.2.300.101 - 107 NMAC.
6. Part 300 requires facilities that emit 10,000 metric tons of carbon dioxide equivalent ("CO<sub>2</sub>e") to comply with the reporting requirements. In contrast, 40 C.F.R. Part 98, has a threshold of 25,000 metric tons of CO<sub>2</sub>e. See 20.2.300.101 NMAC.

### **Adoption of Part 301 (Verification Rule)**

1. NMAC, Title 20, Chapter 2, Part 301, was proposed by NMED in a Petition that it filed on July 30, 2010.
2. Part 301 was adopted by the Board (by a vote of 5 to 1) on November 10, 2010.
3. The stated objective of Part 301 "is to establish requirements for the verification of annual reports of greenhouse gas emissions to the department." 20.2.301.6 NMAC.
4. 20.2.301.101 NMAC requires third party verification of annual emissions reports. The third party verification is conducted by a "verification body."

5. 20.2.301.102 NMAC establishes the procedure for accreditation of "verification bodies."

6. Part 301 also establishes requirements for verification services (20.2.301.103 NMAC), the composition of verification teams (20.2.301.104 NMAC), subcontracting verification services (20.2.301.105 NMAC), conflict of interest submittal requirements for accredited verification bodies (20.2.301.106 NMAC) and conflict of interest requirements for verification bodies (20.2.301.107 NMAC).

### C. Current Proceeding

1. Petitioners filed joint Petitions for Regulatory Change for the proposed repeal of Parts 300, 301 and 350 on July 15, 2011.<sup>1</sup>

2. On July 20, 2011, the petition was docketed as EIB 11-17(R), as a separate proceeding from 10-09(R) (and 10-04(R) which relates to the adoption of Part 350).

3. On July 21, 2011, NMED entered an appearance.

4. On August 1, 2011, the Board unanimously agreed to consider the Petition for Regulatory Changes and appointed Felicia Orth as Hearing Officer.

5. On August 1, 2011, EIB 11-17(R) was consolidated with EIB 11-15(R). Minutes, Environmental Improvement Board Meeting, Aug. 1-2, 2011 at 2-3 (as unanimously adopted with amendments on Sept. 2, 2011).

6. On August 11, 2011, the Hearing Officer issued an *Order Establishing Procedures* establishing November 8, 2011 as the date of commencement of the hearing.

7. On August 22, 2011, the Board published notice of the hearing in the *Albuquerque Journal*, 78 days in advance of the hearing. *Albuquerque Journal*, Legal Notices, Aug. 22, 2011 ("New Mexico Environmental Improvement Board Notice of Public Hearing to Consider Proposed Repeal of 20.2.300, -301 and -350 NMAC"), available at <http://legals.abqjournal.com/legals/2011/8/22>. See also NMSA 1978, §74-

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<sup>1</sup> The Order and Statement of Reasons regarding the repeal of Part 350 (EIB-11-15(R)) is a separate document.

2-6(C) ("Notice of the hearing shall be given at least thirty days prior to the hearing date ... [and] shall be published in a newspaper of general circulation in the area affected.").

8. On August 26, 2011, WRA entered an appearance.

9. On August 26, 2011, the Board provided notice of its consideration of the petition to the Small Business Regulatory Advisory Commission by sending the Commission a letter advising it of the proposed repeal of Parts 300, 301 and 350 and the hearing date for the public hearing on the proposed repeal.

10. On August 31, 2011, a notice of public hearing commencing November 8, 2011, was published in the *New Mexico Register*. XXII N.M. Reg. No. 16 at 595 (Aug. 31, 2011).

11. On August 31, 2011, NEE filed a *Motion to Recuse Board Members Casciano, Fulfer and Peacock; Objections to Order Establishing Procedures and Request to Vacate or Amend*; and a *Motion That Board Members Fully Disclose Information Relating to their Possible Bias and Lack of Impartiality*.

12. On September 15, 2011, NMED (who originally proposed Parts 300, 301 and 350) and Petitioners filed notices of intent to present technical testimony and direct testimony in support of the petition to repeal Parts 300, 301 and 350, 54 days prior to the hearing.

13. On September 16, 2011, NMOGA filed a notice of correction of testimony.

14. At the October 3, 2011 regular Board meeting, the Board took up several motions including NEE's *Motion to Recuse Board Members Casciano, Fulfer and Peacock* and *Motion That Board Members Fully Disclose Information Relating to their Possible Bias and Lack of Impartiality*. Board Members Casciano and Fulfer announced their recusal on the record in accordance with 20.1.1.111 NMAC. Board Chair Peacock did not recuse herself. Board members made disclosures that they believed were relevant. See Transcript of October 3, 2011 meeting, Board Orders on Recusal Motions.

15. On October 24, 2011, entries of appearance were filed by League of Women Voters of New Mexico, Center of Southwest Culture, Inc. and Amigos Bravos.

16. A public hearing on the repeal petitions commenced on November 8, 2011, continued on November 9, 2011, and concluded on November 15, 2011.

Although no parties besides Petitioners and NMED presented pre-filed technical testimony in this proceeding, NEE and WRA did actively and vigorously cross-examine Petitioners' and the Department's witnesses during the hearing and introduced evidence in the form of hearing exhibits.

17. There was substantial public comment received both in the 2010 and 2011 proceedings, although most public comment was directed to cap and trade (Part 350) and not Parts 300 and 301 specifically. That public comment is explained more fully in the Order and Statement of Reasons concerning Part 350, which is incorporated herein by reference.

18. During the public hearing on November 15, 2011, after soliciting input from Board Members, the Hearing Officer announced that the Board would take administrative notice of the entire record in EIB 10-04(R) and EIB 10-09(R) in the instant proceeding. EIB 11-15/11-17(R) Tr. 538:21-23.

19. Closing arguments and proposed statements of reasons were filed by some of the parties on January 6, 2012.

20. On February 6, 2012, the Board met to deliberate on Parts 300, 301 and 350. The Board deliberated and voted unanimously to repeal Parts 300, 301 and 350. The five votes in favor of repeal represents a majority of a quorum as required by the Air Quality Control Act, NMSA 1978, Section 74-2-3(A) ("In taking any action under the Air Quality Control Act . . . , a majority of the environmental improvement board constitutes a quorum, but any action, order or decision of the environmental improvement board requires the concurrence of three members present at a meeting.").

21. The repeal of Parts 300 and 301 was filed with the State Records Center on February 13, 2012.

22. This Statement of Reasons dated March 9, 2012, completes the Board's action on this repeal.

### **STATUTORY AUTHORITY AND APPLICABLE LEGAL STANDARDS**

1. Pursuant to the Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to -17 (1971), the Environmental Improvement Board is empowered with promulgating

rules and standards for “air quality management *as provided in the Air Quality Control Act.*” NMSA 1978, § 74-1-8(A)(4) (emphasis added).

2. According to the Air Quality Control Act (“AQCA”), the Board “shall . . . adopt, promulgate, publish, amend and *repeal* regulations consistent with the Air Quality Control Act . . . to . . . prevent or abate air pollution.” NMSA 1978, § 74-2-5(B)(1) (emphasis added).

3. The ACQA states: “Any person may recommend or propose regulations to the environmental improvement board.” NMSA § 74-2-6(A). Subsection B states:

No regulation or emission control requirement shall be adopted until after a public hearing by the environmental improvement board . . . As used in this section, “regulation” includes any amendment *or repeal thereof*.

NMSA 1978, § 74-2-6(B) (emphasis added).

4. The Board’s rulemaking procedures define a “regulatory change” as the “adoption, amendment *or repeal* of a regulation.” 20.1.1.7(P) NMAC (emphasis added).

5. Pursuant to 20.1.1.300(A) NMAC, “[a]ny person may file a petition with the board to adopt, amend or *repeal* any regulation within the jurisdiction of the board.” (emphasis added).

6. New Mexico case law establishes that agency consideration of a regulatory repeal must be adequately noticed and supported by evidence in the record. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm’n (In re Rates and Charges of Mountain States Tel. & Tel. Co.)*, 104 N.M. 36, 41-42, 715 P.2d 1332, 1337-38 (1986); *see also Hobbs Gas Co. v. New Mexico Pub. Serv. Comm’n*, 115 N.M. 678, 680-81, 858 P.2d 54, 56-57 (1993).

7. Pursuant to NMSA 1978, Section 74-2-9(C)(2), the Board’s decision must be supported by substantial evidence. Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder. *Wagner v. AGW Consultants*, 2005-NMAC-016, ¶85, 137 N.M. 734, 114 P.3d 1050; *Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers*, 1998-NMSC-020, ¶17, 125 N.M. 401, 962 P.2d 1236.

8. Pursuant to NMSA 1978, Section 74-2-5(E):

In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

- (1) character and degree of injury to or interference with health, welfare, visibility and property;
- (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
- (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

12. We note that the proceedings of EIB 10-04(R) and 10-09(R) are sometimes referred to herein as the "2010 proceedings" or "2010 hearings"; and the proceedings of EIB 11-17(R) are sometimes referred to herein as the "2011 proceedings or "2011 hearings."

**NO BIAS AND NO EX PARTE COMMUNICATIONS**

Each of the individual Board members who participated in the 11-15(R)/11-17(R) proceedings stated on the record that he or she could be fair and impartial. NEE, however, made allegations of bias against the entire Board and the individual members of the Board. In addition, NEE made allegations of *ex parte* communications by the Board and its Chair. See Motion to Recuse Board Members Casciano, Fulfer and Peacock EIB 11-15 (R)/11-17(R) PL9; Transcript of October 3, 2011 Meeting, and Order on Motion to Recuse Board Members Casciano, Fulfer and Peacock EIB 11-15(R)/11-17(R) PL84.

The members of the Board were not biased regarding these proceedings, and no *ex parte* communications occurred. The Board's response to these allegations are

addressed fully in the Order and Statement of Reasons in EIB 11-15(R) which are incorporated herein by reference.<sup>2</sup>

### **FINDINGS OF THE BOARD AND STATEMENT OF REASONS**

Pursuant to 20.1.1.406(E) NMAC the Board issues the following finding of facts and Statement of Reasons. These findings consider the categories that the Board is required to consider as set out in NMSA 1978 § 74-2-5(E). None of these findings are intended to reflect the order of significance the Board ascribes to each of its findings.

1. The Board has fully considered the criteria set forth in NMSA 1978, Section 74-2-5(E) and has concluded that substantial evidence warrants repeal of Parts 300 and 301. In repealing Parts 300 and 301, the Board does not disregard the facts and circumstances it relied upon in 2010 when it adopted Parts 300 and 301. In considering the petition, the Board has carefully considered the record in EIB 10-04(R) and EIB 10-09(R) including the Statement of Reasons the Board adopted in November 2010 in support of Parts 300 and 301. The Board has also carefully considered the evidence presented in this proceeding in support of and in opposition to the repeal of Parts 300 and 301. The Board has considered and weighed all of the evidence in the record. Citations to specific portions of the record in this Statement of Reasons are only intended to be illustrative of this evidence.

2. While the Board is not required to show a change in circumstances for its decision to repeal Parts 300 and 301, substantial evidence was presented of material changes since the adoption of Parts 300 and 301 in November 2010. See *Motor Vehicle Manufacturers Association v. State Farm*, 463 US 29, 57 (1983) (agencies may change its course "either with or without a change in circumstances.").

3. The Board's findings also include the linkage of Part 350 (which was repealed by this Board) to Parts 300 and 301. These findings also include

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<sup>2</sup> The Board notes that NEE has not filed an appeal or request to intervene in the New Mexico Court of Appeals regarding the adoption of Parts 300 and 301 (the Court of Appeals mediation was the focus of NEE's allegations regarding *ex parte* communications). The Board further notes the NEE never entered an appearance regarding Parts 300 and 301. However, EIB11-15(R) and EIB 11-17(R) were consolidated.



consideration of material changes which have occurred and/or new substantial evidence received since this Board adopted Parts 300 and 301.

4. The Board incorporates its comments from deliberations in 11-15(R) herein by reference, since EIB 11-15(R) and EIB 11-17(R) were consolidated. The Board could have issued a single Order and Statement of Reasons regarding 11-15(R) and 11-17(R), however, it has separated them in order to facilitate better understanding of its rationale and reasons for repeal.

5. The Board does acknowledge that repeal of Parts 300 and 301 constitutes a reversal within a relatively short period of time. The findings set forth herein demonstrate that the Board has considered the factual findings of the 2010 proceeding, and the Board has provided a reasoned explanation, with support from the record, for the reasons for its change in position.

6. The Board considered substantial evidence in the record of material changes since Parts 300 and 301 were adopted in 2010, including the Board's decision to repeal Part 350.

7. The most significant material change since the 2010 proceedings is the Board's decision to Repeal Part 350, which was repealed by this Board on February 6, 2012. Although Parts 300 and 301 do not contain specific language that they would sunset or lapse if Part 350 is repealed, there was substantial testimony in the record that if Part 350 was repealed, then Parts 300 and 301 should also be repealed.

8. Part 350 was referred to extensively in the Board's Statement of Reasons (EIB 10-09(R)) for adopting Parts 300 and 301. It is clear from the Board's Statement of Reasons that Parts 300 and 301 are linked to Part 350 and were adopted to support Part 350 (now repealed). The most relevant statements from the Board's Statement of Reasons ("SOR") in EIB 10-09(R), linking Parts 300 and 301 to Part 350, are as follows:

- a. "The regulations support Part 350." SOR, Page 5, paragraph 10.
- b. "...Parts 300 and 301 establish comprehensive, uniform, and accurate mandatory reporting of GHG emissions to support Part 350." SOR, Page 4, Paragraph 4.

c. "...the Board has the necessary and appropriate authority to adopt the verification regulation to ensure the accuracy of reporting for purposes of Part 350". SOR, Page 4, lines 2-3.

d. "Part 350 establishes requirements designed to reduce GHGs from affected facilities." SOR, Page 4, Paragraph 5.

e. "Part 350 requires that another jurisdiction have reporting and verification requirements comparable to those in the proposed regulations as a condition of New Mexico accepting compliance instruments originating in that jurisdiction." SOR, Page 5, Paragraph 9.

f. "The modification [reporting regulation] is necessary to ensure the high accuracy of emissions quantification required to implement a cap-and-trade program." SOR, Page 6, paragraph 12.

g. "Verification is required for affected facilities reporting more than 25,000 metric tons CO<sub>2</sub>e per year of emission, the threshold for inclusion in Part 350. SOR, Page 7, paragraph 17.

9. Other witnesses testified that Parts 300 and 301 should be repealed if Part 350 is repealed. As an example, Mr. Richard Goodyear, acting Chief of the Environment Department's Air Quality Bureau, witness on behalf of NMED, testified:

[T]he three were proposed as a package, and they go together, and if the cap-and-trade rule [Part 350] disappears, then certainly there is not a lot of justification to retain the verification rule, 301, and the reporting rule would seem to be unnecessary because of the lower threshold, when at the same time you have reporting being made to EPA under their rule.

EIB 11-15(R)/11-17(R) Tr. 123:10-16 (Goodyear).

10. Because Part 350 was repealed, and because there was substantial evidence that the primary purpose of Parts 300 and 301 was to support Part 350, this Board has determined that Parts 300 and 301 should also be repealed.

11. The Board notes that no party suggested in the 2011 proceedings that Parts 300 and 301 should remain if Part 350 was repealed.

12. There was testimony in the 2010 proceedings by Mr. Jim Norton, Director of the Department's Environmental Protection Division, witness on behalf of NMED, that:

These rules will not only serve as a foundation for the regional greenhouse gas cap and trade system that we've talked about through the Western Climate Initiative, but also important in preparing New Mexico to have additional data that can be used for a number of different reasons.

EIB 10-09(R) Tr. 19:22 to 20:2 (Norton). However, this Board has determined that there is no environmental benefit or any other benefit, with the added costs both to industry and NMED, to justify the gathering of additional data for analysis.

13. NMED, which originally proposed Parts 300 and 301, and which is responsible for administering these rules, now supports the repeal of Parts 300 and 301. EIB 11-15(R)/11-17(R) Tr. 37:4-5 (Tongate). Mr. Butch Tongate, Deputy Secretary of the New Mexico Environment Department, witness on behalf of NMED, stated that "regulations that increase costs without achieving meaningful, let alone discernible environmental benefits constitute bad policy." EIB 11-15(R)/11-17(R) PL35 - Tongate Direct at 7:16-17.

14. The Board also considered the statutory requirements of NMSA § 74-2-5(E), which states:

In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

- (1) character and degree of injury to or interference with health, welfare, visibility and property;
- (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
- (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

The Board makes the following findings and recites certain testimony regarding NMSA § 74-2-5(E):

15. In the Board's 10-09(R) Statement of Reasons, the Board stated that Part 300 harmonizes the state and federal reporting requirements. EIB 10-09(R) PL20 - SOR, p. 4, paragraph 4. Under the federal rule, 40 C.F.R., Part 98, facilities that emit 25,000 metric tons of CO<sub>2</sub>e or more per year are already required to measure and report greenhouse gas emissions. Thus, there is not harmonization between Parts 300 and 301 and the Federal Rules in that the threshold amounts are different (10,000 vs. 25,000 metric tons CO<sub>2</sub>e per year) and the verification procedures are different (self verification vs. third-party verification).

16. In addition, Mr. Goodyear testified that since October 28, 2010, there were at least ten federal rulemakings amending 40 CFR 98 and they have not been incorporated into Part 300. EIB 11-15(R)/11-17(R) PL35 - Goodyear Direct at 1:22 to 2:3.

17. Mr. Douglas B. Price, P.E., Environmental Supervisor, Navajo Refining Co., witness on behalf of NMOGA, testified that:

All refineries within the United States are required to report GHG emissions to the EPA under 40 C.F.R. Part 98 . . . However, the refineries in New Mexico have an additional burden to comply with the reporting requirements of 20.2.300 NMAC. While [NMED] adopted modified portions of 40 CFR 98 in 20.2.300 NMAC in an attempt to make the rule consistent with the federal requirements, Part 300 imposes some additional burdens. For example, 20.2.300.103.C NMAC requires the installation of monitoring equipment to measure the carbon content and molecular weight of refinery fuel gas. However, 40 CFR 98 does not explicitly impose this requirement on all refineries in the United State[s].

EIB 11-15(R)/11-17(R) PL41 - Price Direct at 5:2-12.

18. Part 300 subjects numerous entities to New Mexico state reporting requirements that are not required to report under 40 C.F.R. Part 98. Mr. Goodyear testified, quoting from 10-09(R) that the lower, 10,000 metric tons threshold of actual emissions that trigger reporting under Part 300 is estimated to result in about 75 additional New Mexico facilities coming within its reporting requirements. See EIB 10-09(R) Tr. at 31:3-9 (Brad Musick, Environmental Scientist, Environmental Engineering Specialist, and Environmental Analyst with the Air Quality Bureau, witness on behalf of NMED). Some of these facilities may be operated by smaller companies. See EIB 10-

09(R) Tr. at 105:15-22 (Brad Musick) EIB 11-15(R)/11-17(R) PL35 - Goodyear Direct at 4:7-15.

19. Ms. Barbara A. Walz, Senior Vice President, Policy and Environmental, Tri-State Generation and Transmission Association, Inc., witness on behalf of Tri-State, testified that the Reporting and Verification Rules are costly, duplicative, and unnecessary in light of the EPA's existing mandatory greenhouse gas reporting requirements. These rules require New Mexico sources to submit to the New Mexico Environment Department the same report that goes to the EPA pursuant to the federal regulations, at the same time. This duplicative requirement fails to render any environmental benefit. EIB 11-15(R)/11-17(R) Tr. 173:21-25; 174:5-10 (Walz); EIB 11-15(R)/11-17(R) PL39 – Walz Direct at 6.

20. The greenhouse gas emissions information submitted to the EPA will be available if an outside entity wishes to obtain it. EIB 11-15(R)/11-17(R) Tr. 174:2-3 (Walz).

21. EPA's reporting rule does not require mandatory verification of reported greenhouse gas emissions. Instead, regulated entities self-certify and submit emissions and activity data necessary for verification to EPA. This is consistent with many other EPA reporting programs. EPA has used this mechanism in many major reporting and regulatory programs developed under the Clean Air Act, including the Acid Rain Program, NSPS, and other permitting programs. Under these programs, a responsible corporate official signs the certification stating that the information reported is accurate and complete. EPA and/or state agencies perform verification of the data reported; follow-up with facilities on potential errors and discrepancies; and, conduct compliance assistance and enforcement activities to ensure accurate report. The facilities self-certify that the reported data is accurate and EPA relies on systems that encourage proper data collection and reporting as well as extensive EPA verification of reported data. EIB 11-15(R)/11-17(R) Tr. 277:5-23 (Mr. Britt Chesnut, REUS Environmental Scientist, witness on behalf of COF and FEUS).

22. Regarding verification, a significant difference between the federal requirements and New Mexico's are that Part 301 requires a third party to verify emissions data reports. Under the federal requirements, EPA verifies the data, most of

which will be the same as the carbon dioxide data now monitored by continuous emission monitors and reported pursuant to the federal Acid Rain Program. The data are collected in accordance with federal regulations and are subject to rigorous prescribed quality assurance and quality control measures. EIB 11-15(R)/11-17(R) PL39 – Walz Direct at 6.

23. No additional environmental benefit is seen as a result of requiring third-party verification, a fact that EPA recognized in creating consistent nationwide requirements without third-party verification. EIB 11-15(R)/11-17(R) PL39 – Walz Direct at 6.

24. In addition to the initial installation costs of complicated instruments required for the reporting, which are likely to be between \$100,000 and \$250,000 per sampling location, these instruments require a tuning inspection and maintenance by skilled technicians familiar with this type of equipment. EIB 11-15(R)/11-17(R) PL41 – Price Exhibit B at 19:9-11.

25. The federal mandatory reporting rule, 40 CFR 98, that is currently in effect, accomplishes the reporting and verification requirements without burdening facilities with additional costs and duplicate reporting to the State. EIB 11-15(R)/11-17(R) PL38 – Chestnut Direct at 6:12-23.

26. The Board found the testimony compelling that New Mexico should not have its own reporting rules, especially when the data is reported to and available from the EPA.

27. The Board found the testimony compelling that New Mexico should not have a third-party verification program when the EPA successfully uses a self-verification program; and that the third-party verification program is complicated and unnecessary.

28. Based on substantial evidence in the record, the Board determined that the benefits of third-party verification and the gathering of additional data for analysis under the reporting rule do not justify the costs.

29. Based on substantial evidence in the record, the Board determined that the economic burden required by Parts 300 and 301 outweighs any kind of alleged environmental benefit.

30. Based on substantial evidence in the record, the Board determined that these rules will not have any effect on the character or degree of injury to or interference with health, welfare, visibility, property; nor will they help the public interest; nor are they technically practical or economically reasonable.

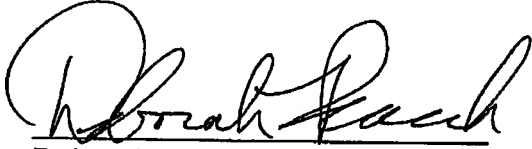
### **CONCLUSION**

The Board has voted to repeal Parts 300 and 301 based on substantial evidence in the record for the following reasons:

1. Repeal will not cause injury to or interference with health, welfare, visibility and property.
2. Repeal will not harm the public interest.
3. Parts 300 and 301 are not technically practicable or economically reasonable to reduce or eliminate air contaminants.
4. There were material changes since the adoption of Parts 300 and 301, as follows:
  - a. Part 350 has been repealed and Parts 300 and 301 are no longer necessary, as they were intended to support Part 350;
  - b. NMED originally petitioned for Parts 300 and 301 but now supports repeal;
  - c. Other regulations regarding greenhouse gas emissions have been implemented or are being implemented at the Federal level and Parts 300 and 301 are not harmonized with these Federal regulations;
  - d. Third party verification, instead of self-certification as required by the EPA, is determined to be unnecessary; and
  - e. The reporting data under the existing Federal regulations is available from the EPA.

## ORDER

By a unanimous vote of 5 to 0, Parts 300 and 301 (20.2.300 NMAC and 20.2.301 NMAC) are repealed in their entirety. The repeal is effective thirty (30) days from the date of this Statement of Reasons (which completes the Board's repeal action pursuant to 20.1.1.406(E) NMAC and 20.1.1.406(F) NMAC and NMSA 1978, Section 74-2-6(F)).



Deborah Peacock, Chair  
New Mexico Environmental Improvement Board

March 9, 2012  
Date